

Land Acquisition Policies and Proceedings in TVA—A Study of the Role of Land Acquisition in a Regional Agency

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When Congress created the Tennessee Valley Authority in 1933,¹ it launched an experiment in a new technique of government. The corporate device for carrying on governmental business had been used to a great extent during the first World War,² and, in fact, goes back as far as the creation of the Bank of the United States in the administration of President Madison.³ Navigation,⁴ flood control,⁵ and soil conservation and reforestation⁶ had long been traditional fields of governmental activity and the Bureau of Reclamation had been engaged in the generation and sale of electric power for a great many years.⁷ Traditionally, however, the various operations of the federal government had been departmentalized and divided among a number of agencies with headquarters in the nation's capital.

WHAT CONSTITUTES A REGIONAL AGENCY

The thing about TVA that was unique was the delegation to an autonomous agency, with its headquarters in the region, of complete responsibility for the carrying out of a program of regional development. Instead of entrusting the construction of dams to one agency, the sale of power to another, the condemnation of land and approval of titles to a third, and the selection of personnel to a fourth, all these and additional functions which would have been entrusted to still other agencies if the Tennessee Valley had been developed in accordance with the traditional pattern were entrusted

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¹ 48 STAT. 58 (1933), as amended, 16 U.S.C. 831 *et seq.* (1946).

² For a description of the various corporations created during the first World War, see VAN DORN, GOVERNMENT OWNED CORPORATIONS (1926). These included the Emergency Fleet Corporation, the United States Grain Corporation, the War Finance Corporation, and the United States Sugar Equalization Board, among others.

³ See *McCulloch v. Maryland*, 4 Wheat. 316 (U.S. 1819).

⁴ *Scranton v. Wheeler*, 179 U.S. 141 (1900).

⁵ *Jackson v. United States*, 230 U.S. 1 (1912).

⁶ *United States v. Griffin*, 58 F. 2d 674 (W.D. Va. 1932).

⁷ 34 STAT. 116, 43 U.S.C. §§ 561, 562 (1946), *Arizona v. California*, 283 U.S. 423 (1931).

to a single agency located in the region in which it was to operate—a regional agency.

Perhaps the best definition of a regional agency is that of David E. Lilienthal in *TVA-Democracy on the March*, at page 153, in which he defines the essentials of the TVA idea, that is, the regional agency concept, as including:

- a federal autonomous agency, with authority to make its decisions in the region
- responsibility to deal with resources, as a unified whole, clearly fixed in the regional agency, not divided among several centralized federal agencies
- a policy, fixed by law, that the federal regional agency work co-operatively with and through local and state agencies.

WHY LAND ACQUISITION POLICIES ARE IMPORTANT

At first blush, it might seem that the problem of land acquisition for any governmental agency is a simple one. Since TVA is endowed with the power of eminent domain, it might appear that the problem is simply one of deciding what land is needed, buying from the owners who are willing to sell, and condemning the land of those who refuse to convey voluntarily; but this is far from the case. As a regional agency, TVA's job is not finished when it acquires the necessary lands or easements and constructs the project. It is a permanent agency carrying on a program within the Tennessee Valley, which directly affects the lives of the people, and TVA is solely responsible for the success or failure of that program. If the program is a failure in any respect, TVA cannot excuse itself by saying that the responsibility for that branch of the program rests in some other agency. Congress has given TVA the necessary tools to do the work and has imposed on it full responsibility.*

The ultimate objective of the TVA program is, of course, the welfare of the individuals who live in the TVA area, but even viewed narrowly a land acquisition program which promotes respect and confidence rather than antagonism is important to the accomplishment of the specific objectives of the TVA program. TVA has constructed or has under construction 18 major dams and reservoirs⁹ and over 4,000 miles of transmission lines. These projects extend from one end of the Tennessee Valley to the other, and the reservoirs alone have required the acquisition of over 1,100,000 acres of land. An acquisition program of this extent and magnitude directly affects many thousands of persons. The sale of

* For a detailed discussion of this question see LILIENTHAL, *TVA—DEMOCRACY ON THE MARCH* 167-178 (1944).

⁹ In addition, TVA has raised the height of Wilson Dam, which was constructed by the United States between 1918 and 1925, and Hales Bar Dam, which was constructed by a private power company between 1905 and 1913.

his farm to TVA may be the first, and it is by all odds the most important, contact that the landowner has with TVA and his attitude toward TVA is dependent, to a great extent, upon the impression which he gains as a result of that transaction. A person who is seriously dissatisfied with the manner in which such negotiations were handled can hardly be expected to participate enthusiastically in other phases of the program of regional development.

A reference to just a few of these phases will indicate how important local participation is.¹⁰ Thus, the electric power produced at the dams is distributed by cooperative associations in the rural areas.¹¹ The farmer who has sold his farm in a reservoir area and moved to an adjoining community is, more than likely, a member of one of the cooperatives on which TVA depends to distribute the power generated at the dams. The program of fertilizer research and demonstration is carried on through a series of test demonstrations, in which TVA distributes fertilizer to test-demonstration farms, selected by the farmers themselves, on which the fertilizer is used in such a way as to test and demonstrate the advantages of the proper use of concentrated phosphatic fertilizers in a soil-conserving system of farm management.¹² The same farmer who has moved from the reservoir area is probably engaged in one phase or another of the test-demonstration program. His intelligent and enthusiastic participation can scarcely be expected if he has acquired an antipathy toward TVA as a result of the negotiations for the sale of his property. Such examples could be carried on almost indefinitely. What is true of the test-demonstration program is equally true of the forest resources program and the program to secure increased and better utilization of electricity on the farms. Even the building of the dams requires a high degree of cooperation from the people of the Valley. In constructing its dams, TVA has relied almost entirely on local labor. Approximately 160,000 individuals have been employed by TVA at one time or another, and a great many of these have been from the reservoir areas. The high morale that made possible the completion of the TVA dams on record-breaking schedules could easily have been wrecked by unfortunate land acquisition policies.

MAJOR OBJECTIVES OF LAND ACQUISITION PROGRAM

The importance of conducting the land acquisition program in such a way as to insure the retention of the good will of the people

¹⁰ The reasons behind the principle of local participation, the so-called "grass roots approach," is discussed in LILIENTHAL, *TVA-DEMOCRACY ON THE MARCH* 76-77 (1944).

¹¹ In the larger centers of population, it is distributed by municipalities.

¹² For a detailed description of the TVA test-demonstration program, see *Annual Report of the Tennessee Valley Authority* 37-43 (1947).

directly affected was recognized by TVA from the outset and two major objectives were established for this program: First, to obtain the lands needed at a cost which is fair to the Government; and second, to leave the area in which a reservoir is built and the people who lived in the reservoir area at least as well off as they were before TVA entered the picture. Experience has shown that there is no inconsistency between these two objectives, that, in fact, a land acquisition program which insures fair and impartial treatment of the affected landowners is the most effective method of obtaining the needed lands at a reasonable price.

THE PROBLEM OF WHAT TO ACQUIRE

The first problem which must be faced in any land acquisition program is the extent of the lands or interests in lands to be acquired. The construction of a reservoir inevitably disrupts to a greater or lesser extent the life of the region in which it is located. Towns which are trading centers for the surrounding countryside are flooded; churches and schools are flooded; farms are flooded and their owners must seek other farms in the surrounding counties or move away; and highways and railroads are flooded so that transportation facilities must be readjusted over a considerable area.

It is possible in building a reservoir to acquire only flowage easements to the maximum elevation of the reservoir and pay damages to individuals, counties, and corporations whose property has been taken, and to assume no responsibility for eliminating the economic dislocations which the reservoir causes. Such a procedure is not only a callous one, but it would have had a disastrous effect upon the TVA program. The TVA Act did not contemplate that TVA would proceed in this manner. Section 18 of the Act¹³ authorizes the TVA Board to enter into agreements for the relocation of railroads and highways and other facilities which are flooded, and this power has been freely exercised. Where part of a county road system has been flooded, for example, it has not been the policy of TVA to pay damages to the county or require that the county sue it for damages. Neither procedure would insure the construction of the roads necessary to provide an adequate highway system for the county as it would exist after the construction of the reservoir. The procedure followed by TVA has been to make a careful study of the needs of

¹³ " . . . it is hereby authorized and empowered . . . to negotiate and conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other person, firm, or corporation, for the relocation of railroad tracts, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act."

the county as they would exist after the reservoir was constructed; to prepare a tentative proposal for the relocation of the county's roads; and then to sit down with the officials of the county, go over the entire problem, and agree on exactly how the county's road system should be readjusted. TVA then enters into a contract with the county to construct the roads agreed on in return for a full release of liability for the flooding of the roads affected by the reservoir. If the construction of the roads were delayed until the reservoir was filled, parts of the county would be isolated and the cost of construction, where the roads cross arms of the reservoir, would be increased manifold. The reaching of an agreement with the county, whereby TVA agrees to construct the roads, enables it to fit their construction into the construction schedule for the dam and eliminates any possibility of delay. This procedure has been uniformly successful. Since 1933, TVA has entered into 47 contracts of the type described above with six states and 120 contracts with 58 counties and municipalities in 20 different reservoir areas, and it has never failed to reach an agreement satisfactory to both parties.¹⁴ Similar arrangements have been made with the railroads, telephone companies, and other utilities whose properties have been flooded by the construction of the various reservoirs.

The determination of what interests in land to acquire has been guided by the cardinal principle referred to above of leaving the area as well off as it was before the reservoir was constructed. No uniform policy has been followed with reference to the purchase of easements or fees, the decision being made largely on the basis of the type of land affected. In the larger municipalities, such as Knoxville, Chattanooga, and Decatur, where riverfront land has a distinct industrial or commercial value, the general policy of acquiring only easements has been followed. This has also been true where fertile land is affected which will still be valuable for agriculture after the construction of the reservoir, as in large parts of Douglas, Cherokee, Fort Loudoun, and Kentucky Reservoirs. On the other hand, where the land adjoining a reservoir is poor upland, valuable

¹⁴ The TVA dam construction program has resulted in litigation with only one county due to the flooding of highways. In connection with the construction of Douglas Reservoir, a part of the road system of Jefferson County, Tennessee, was flooded. TVA and the County agreed on the roads which ought to be replaced and the work which would be necessary. TVA agreed to do this work, although it involved an expenditure more than ten times the original cost of all the roads flooded. The County insisted that TVA in addition pay the value of roads flooded but not replaced. An agreement was finally reached that TVA would do the work agreed on and the County would release it from liability, reserving, however, the right to file suit for the value of the roads which were flooded and not replaced. Suit was filed and TVA's position was upheld in *Jefferson County v. Tennessee Valley Authority*, 146 F. 2d 564 (C.C.A. 6th 1945), *cert. denied*, 324 U.S. 871 (1945).

primarily for recreation, the general policy has been to acquire such lands in fee, as, for example, in the Norris and Hiwassee Reservoirs.

The determination of exactly what land or interest shall be taken cannot, however, be decided simply on the basis of general policies. Where a farm is entirely flooded, it is taken in its entirety; but where the maximum reservoir elevation runs through a piece of land or where roads serving the land are flooded, the decision as to what interest to take is based on a study of the effect of the reservoir on that particular piece of land.

Generally speaking, where the effect of a reservoir on a farm has been minor and the farm will continue to be an economic unit after the construction of the reservoir, only the part flooded has been taken; but where the remainder is incapable of supporting a farm family, the policy has been to acquire the entire farm. This results in no additional expense to the Government, since payment for the minimum amount of land required plus severance damage to the remainder would generally equal the value of the entire tract. It has the advantage of making it easier to deal with the landowner and it eliminates the economic problems which arise where people are attempting to live on land which is incapable of supporting them.

A problem which frequently arises is what to do about areas which are deprived of access by the flooding of the reservoir. To leave the property without access, simply paying the owners for the depreciation in the value of their land resulting from the loss of access, would frequently create serious social and economic problems for the state and county by leaving the people without schools, churches, adequate law enforcement, and access to markets. In such cases, TVA either purchases the land in fee or constructs a road to serve it. The decision as to which course to follow is based largely, but not entirely, on the relative cost of the two procedures. In addition to this factor, consideration is given to the advantages to the state and county of leaving the land in private ownership subject to taxation, as well as possible uses to which the land can be put if acquired by the Government.

An interesting example of this kind of problem occurred in the Fontana Reservoir. This reservoir is located in western North Carolina on the Little Tennessee River, immediately south of the Great Smoky Mountains National Park. Between the reservoir and the park is a mountainous area of 44,000 acres, which, prior to the construction of the reservoir, was served by a narrow, tortuous mountain road running eastward as far as Bryson City. The road was flooded by the reservoir in a number of places and its relocation, even by a road of the same inferior type, would have cost about \$1,400,000.00, which was about double the value of the 44,000 acres.

The construction of an adequate highway to serve the area would have cost between \$3,000,000.00 and \$4,000,000.00. The highway belonged to the state, but had been constructed originally by Swain County, and bonds which had been issued by the county to pay for the road were unpaid. The situation was further complicated by a ruling of the War Production Board that it would not issue priorities for the materials necessary for the reconstruction of the highway

This problem, which at first appeared well nigh insoluble, was worked out to the satisfaction of all parties after extended negotiations. The final solution was an agreement between TVA, the National Park Service, the state of North Carolina, and Swain County, by the terms of which TVA agreed to purchase all the lands served by the highway and turn them over to the National Park Service for incorporation in the Great Smoky Mountains National Park and to pay Swain County the sum of \$400,000.00, to be used in paying off the bonds. Of the \$400,000.00 paid by TVA, \$100,000.00 was contributed to TVA by the state, and both the state and county executed full releases.

This agreement was advantageous to all parties. It enabled the National Park Service to include in the Great Smoky Mountains National Park land which logically belonged in it and gave the park a border on a beautiful mountain lake. TVA settled its legal obligations for several hundred thousand dollars less than the cost of building a comparable road to replace the one that was flooded, which was the measure of its legal obligations.¹⁵ The state and county avoided the social and economic problems which would have resulted had this inaccessible mountainous area been left in private hands without any means of access except by water. In addition, the county was able to pay off the bond issue and the state was relieved of the expense of maintaining an inadequate mountain road with high maintenance costs.

Included in the land to be acquired was one tract of about 4,400 acres which was used as a hunting and fishing lodge. The owner of this tract and five smaller landowners contested the right of the Government to acquire the land. The right of the Government to condemn was sustained by the Supreme Court in *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546 (1946), in a unanimous decision written by Justice Black, which displays a

¹⁵ *Town of Bedford v. United States*, 23 F. 2d 453 (C.C.A. 1st 1927); *United States v. Wheeler Township*, 66 F. 2d 977 (C.C.A. 8th 1933); *United States v. Town of Nahant*, 153 Fed. 520 (C.C.A. 1st 1907); *United States v. Alderson*, 53 F. Supp. 528 (S.D. W.Va. 1944), *Jefferson County v. Tennessee Valley Authority*, 146 F. 2d 564 (C.C.A. 6th 1945), *cert. denied*, 324 U.S. 871 (1945), *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 (C.C.A. 4th 1945)

keen understanding of the functions and problems of a regional agency.¹⁶

VOLUNTARY PURCHASE VERSUS CONDEMNATION

Once the determination has been made as to the lands and easements needed to be acquired for a project, the agency is faced with the problem of how best to acquire it. One possible procedure is to file a blanket condemnation covering all of the land in the reservoir and proceed to try whatever cases cannot be compromised. Congress wisely prohibited TVA from following this procedure. Section 4(i) of the TVA Act permits recourse to condemnation only "in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board." Condemnation has many disadvantages. It is expensive and it takes away from the acquiring agency the determination of the amount to be paid. More important still, it is likely to leave a residue of ill will no matter how hard the parties may try to conduct the proceedings in a friendly manner. The condemning agency and the landowner become antagonists and the feeling of antagonism toward the agency is likely to be carried over consciously or unconsciously into subsequent dealings. TVA,

"And we find not only that Congress authorized the Authority's action, but also that the TVA has proceeded in complete accord with the Congressional policy embodied in the Act. That Act does far more than authorize the TVA to build isolated dams. The broad responsibilities placed on the Authority relate to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley. The TVA was empowered to make contracts, purchase and sell property deemed necessary or convenient in the transaction of its business, and to build dams, reservoirs, transmission lines, power houses, and other structures. It was particularly admonished to cooperate with other governmental agencies—federal, state, and local—specifically in relation to the problem of 'readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisitions of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act.' All of the Authority's actions in these respects were to be directed towards 'development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act . . . all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas. . . ' To discharge its responsibilities the TVA was granted 'such powers as may be necessary or appropriate' for their exercise. Section 4 (h) of the Act gives the TVA the very broad power to 'exercise the right of eminent domain. . . ' Section 4 (i) of the Act empowers the Authority to condemn certain specified types of property and concludes by referring to 'all property that it [the Authority] deems necessary for carrying out the purposes of this Act. . . ' To make clear beyond any doubt the TVA's broad power, Congress in § 25 authorized the Authority to file proceedings, such as the ones before us, 'for the acquisition by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act.' " [Pp. 553-554].

therefore, determined that as much land as possible should be voluntarily purchased.

The autonomy which TVA enjoys under its corporate charter facilitates voluntary acquisition. Where land is being acquired by one of the old-line departments, it is not only necessary that the transaction be approved by the departmental solicitor but the title must be approved by the Attorney General, and the transaction must be pre-audited by the Comptroller General before payment can be made. TVA, on the other hand, approves its own titles and is not subject to such a pre-audit. When TVA determines to purchase a piece of land, it can and does make payment as soon as the transaction is consummated. Since the landowner usually needs the money in order to purchase another place in which to live, it would be impossible to secure most land by voluntary conveyance without the ability to give assurance that payment will be forthcoming promptly¹⁷

THE POLICY OF NO PRICE TRADING

A second alternative is to attempt to purchase as much land as possible and condemn the rest, but it did not take TVA very long to realize that a policy of bargaining with individual landowners would not be feasible. The owners of land in a reservoir differ very widely in bargaining ability and economic strength. The large landowner with ample resources is in a much better position to bargain than is the smaller one. As a result of such a policy, therefore, the agency would pay different prices for lands of the same value. The landowner who sold at a low price would ultimately feel, and with justice, that he had not been treated fairly and there is no reason to suppose that the owner who obtained a high price as a result of protracted negotiations would feel kindly toward the agency as a result. To meet this problem, TVA has adopted as a basic policy the policy of no price trading. To insure like treatment for all landowners, large and small, TVA follows the policy of appraising all land needed for a reservoir on the same basis, offering the landowner the appraised value of his property and refusing to change the price offered unless convinced that some error has been made in the appraisal or some element of value has been overlooked.¹⁸

¹⁷ The autonomy enjoyed by TVA is also invaluable from a purely administrative viewpoint, especially where a reservoir must be constructed on a rush schedule, as in the case of Cherokee and Douglas Dams, which were completed in 20 and 13 months, respectively. Since TVA handles the complete function of land acquisition, it can and does coordinate the examination of titles, appraisal of land, and the purchase or condemnation of land in such a way as to insure that the demands of construction schedules will be met.

¹⁸ Certain exceptions have been made to this policy. Transmission line easements through ordinary farming country, because of their small value,

APPRAISAL PROCEDURES

The appraisal of the land in a reservoir is a product of months of highly organized research and investigation. The first step is to make a background study of the entire reservoir area in as great detail as possible. All of the appraisal personnel participate in the preparation of this study, which covers all factors which could have a bearing on market value. Land sales which have taken place in and near the reservoir during the preceding ten or more years are studied and analyzed and are adjusted by means of the farm real estate index published by the Department of Agriculture. The study also covers farming practices, soils and soil fertility, crop yields and prices, and literally dozens of other factors which have a bearing on the value of land. It also includes inquiries of qualified residents of the area as to the prevailing views on land values.

After the background study has been completed, various field appraisers make independent appraisals of the same tracts. The results are discussed with them by an appraisal committee, which reviews all appraisals for the project, and the supervisor of appraisals, and in this way a uniform basis for fixing values is reached which represents the composite judgment of the appraisal staff.

Before a tract is appraised for the purpose of placing a value on it, a written notice is sent to the landowner advising him that the appraisal will be made at a certain time and inviting him to accompany the field appraiser. After the appraisal has been completed, it is reviewed by the appraisal committee and at least one member of the committee inspects the land. In this way, possibility of error is minimized and substantial uniformity of treatment is assured.

The appraisals are made on what may be called a liberal basis. The Constitution, as interpreted by the courts, requires that the landowner be paid the fair cash market value of his property;¹⁹ but "market value" is not susceptible of mathematical computation. It is a matter of judgment concerning which well-qualified persons may honestly have wide differences of opinion. TVA might appraise

averaging only about \$92.00 per tract, and the disproportionate cost of following the appraisal procedure, are not appraised but are purchased on the basis of a flat amount per running foot, with discretion in the buyer to pay additional compensation for special elements of damage, such as damage to building sites or timber. In a few special situations, such as water power and mineral rights, the price is arrived at by negotiations within a maximum fixed by an appraisal. Properties of this nature are not subject to exact evaluation; there is rarely a problem or even a possibility of comparison with like properties, and negotiation appears to be the fairest, as well as the only feasible, method of arriving at a price.

¹⁹ *Olson v. United States*, 292 U.S. 246, 255 (1934); *Shoemaker v. United States*, 147 U.S. 282, 304-305 (1893).

land at the lowest price that its appraisal staff believed it might bring, rather than on a somewhat higher basis; but if it followed the minimum appraisal basis, it could not buy a very great percentage of the land needed on that basis. The choice is not between buying on the basis of a minimum appraisal or on the basis of a somewhat higher valuation, but rather between paying the higher figure and securing a voluntary conveyance or resorting to condemnation and letting the valuation be fixed by the courts. A policy of minimum appraisals would result in a great increase in the amount of litigation, with a corresponding increase in the administrative costs of land acquisition and with the virtual certainty that in the end the average cost of the land would be more than if higher offers had been made in the first place, since the awards in the condemnation cases, to say nothing of the added costs of litigation, would more than offset the saving on the tracts acquired voluntarily.

The farmer who lives in a reservoir area does not usually want to sell. The loss of his land imposes a burden upon him, even if he receives a fair price. He must find a new place to live, move his household furniture, move or dispose of his farming equipment and stock, and frequently make other substantial adjustments. If he wants to relocate in the same general area, he must buy his new farm in a seller's market in which he is competing with other prospective buyers whose farms have been acquired for the same reservoir project.²⁰ These factors are taken into consideration by TVA and an attempt is made to leave the landowner in as good a financial position as he occupied before his land was purchased. This policy is required by considerations of fairness to the landowner and we are satisfied that it pays off in dollars and cents.

COORDINATION BETWEEN LAND-BUYING AND CONDEMNATION

All proceedings for the acquisition of land, including the examination of titles and appraising and purchasing of lands, are handled by a unit within TVA known as the "Land Branch." If it de-

²⁰ In accordance with the authority granted by section 4(1) of the TVA Act, which provides that TVA: "Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end." TVA makes every effort to assist the landowner in finding a suitable farm to purchase elsewhere. Its population readjustment activities also cover the broad problem of assuring that adequate readjustments are made by tenants and others similarly situated who do not have the financial ability to purchase property elsewhere. This subject is beyond the scope of the present article. It is discussed in *The Removal of Families from Tennessee Valley Authority Reservoir Areas*, 16 SOCIAL FORCES 258 (1937-1938).

velops that the land cannot be acquired by voluntary conveyance at the appraised price, it is referred to the General Counsel for condemnation. Condemnation proceedings are then filed by TVA's own legal staff.

Throughout the land-purchasing program, close cooperation is maintained between the Land Branch and the Division of Law. This fact makes it possible to defer the referral of lands for condemnation until the last possible moment and permits the acquisition by voluntary purchase of many tracts which otherwise would be condemned. While the land-buying program is in progress, the attorneys who will handle the condemnations in a reservoir area are in the field working closely with the personnel of the Land Branch. Specific problems which will arise in condemnation are thus identified at an early date and preparations to meet them are made. Prospective witnesses are taken on the land and the case is substantially ready for trial at the time it is referred to the General Counsel for condemnation. Upon such referral, condemnation proceedings are promptly filed and title and possession are obtained through the use of the declaration-of-taking procedure.²¹

CONDEMNATION PROCEDURES

Section 25 of the TVA Act prescribes a special condemnation procedure in TVA cases.²²

²¹ Authority to use the declaration of taking procedure is confirmed by section 4(i) of the TVA Act, which provides that:

"nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 STAT. 1422, c. 307, §§ 1 to 5, inclusive), as now compiled in section 258a to 258e, inclusive, of Title 40 of the United States Code."

The declaration of taking statute provides that upon the filing of a declaration of taking stating in substance that the lands therein described are being taken for a specific public use, and the deposit of the amount of money estimated by the condemning authority to be just compensation for the properties condemned, title shall vest in the United States and the court shall have the power to fix the time and the terms upon which the parties shall be required to surrender possession to the Government.

²² "The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights-of-way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States District Court for the district in which the land, easement, right-of-way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

"Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners who shall be disinterested persons and who shall take and subscribe an oath that they do

The procedure outlined in this section of the Act is unique. The initial determination of value is made by a three-man commission appointed by the district court and the Act requires that these commissioners shall not be residents of the locality in which the land in condemnation lies. If either party is dissatisfied with the award of the commission, he can appeal and have a trial *de novo* before three district judges, except that the parties may stipulate that the hearing shall be before a single judge. The three-judge court may,

not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed \$15 for their services, together with an additional amount of \$5 per day for subsistence for time actually spent in performing their duties as commissioners.

"It shall be the duty of such commissioners to examine into the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned, and for such purpose the commissioners are authorized to administer oaths and subpoena witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

"Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass *de novo* upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

"At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the Circuit Court of Appeals, and the said Circuit Court of Appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such Circuit Court of Appeals shall thereupon fix the value of the said property sought to be condemned."

As to matters not expressly covered by the statute, the procedure follows the state practice in accordance with the provisions of the Conformity Act, 17 STAT. 196, 197 (1872), 28 U.S.C. § 724 (1946). A detailed discussion of the procedure in TVA condemnation cases can be found in Hitching and Claxton, *Practice and Procedure in Eminent Domain Cases under the Tennessee Valley Authority Act*, 16 TENN. L. REV. 952 (1941).

but is not required to, receive additional evidence and inspect the property. From the award of the district court, an appeal lies to the Circuit Court of Appeals, which is required to dispose of the case upon the record "without regard to the awards or findings theretofore made by the commissioners or the district judges."²³

The courts within the Tennessee Valley area have uniformly appointed an attorney as chairman of the commission. The other two members are usually men with some knowledge of real estate values. Generally, they are either real estate brokers or farmers.

Most of the courts have adopted rules requiring that the parties present their entire case before the commission.²⁴ The introduction of additional evidence before the court is permitted only upon a showing of some valid excuse for having failed to introduce the testimony at the commission hearing. The fact that the chairman of the commission is an experienced attorney insures a full and complete hearing in accordance with the rules of evidence, exactly as though the case were tried by a court.

While many of the appeals from the awards of the commission were heard by three-judge courts in the early years of TVA, the conclusion has been pretty generally reached that there is no advantage to either party in requiring a three-judge court and it is frequently a difficult matter to obtain three judges. For this reason, the usual practice is to stipulate that the case will be heard before a single judge.

ADVANTAGES OF THE STATUTORY PROCEDURE

The condemnation sections of the TVA Act were drafted by Honorable Seth M. Richardson, then Assistant Attorney General

²³ This provision was construed as follows in *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 272-273 (1943):

"The purpose of § 25 was to free the Circuit Court of Appeals from the strictures commonly applicable to its review of disputed questions of fact. Under § 25 it does not sit as a 'court of errors.' *United States v. Reynolds*, 115 F. 2d 294, 296 (1940). Its duty is to dispose of the matter 'upon the record, without regard to the awards or findings theretofore made' and to fix the value. But it need not blind itself to the special advantages of the tribunals below in evaluating the evidence. A trial *de novo* with the fresh taking of evidence is not required. An independent revaluation of the property condemned is contemplated." See also *Fain v. United States*, 145 F. 2d 956 (C.C.A. 6th 1944), *United States v. Brandon*, 153 F. 2d 781 (C.C.A. 6th 1946)

²⁴ See *United States v. Travis*, 37 F. Supp. 336 (W.D. Ky. 1941)

"As we interpret the Act, it is designed to provide a full and complete trial before the Commissioners as to property values, and we think it entirely improper and not in accordance with the spirit of the law for either party to disregard the hearing before the Commissioners by reserving his evidence for a hearing before the Court. That is not the proper procedure.

"We have decided that hereafter we shall expect cases to be completely developed before the Commissioners. The court will not hear additional testi-

in charge of the Lands Division of the Department of Justice, at the request of Chairman McSwain of the House Military Affairs Committee. The objective was to provide a procedure which would protect the Government against unreasonable jury awards.²⁵ The procedure has not only accomplished Chairman McSwain's stated objective; it has proved to be tailor-made to fit the problems of a regional agency. Much of the success of the TVA land acquisition program is traceable directly to the condemnation procedure prescribed in the TVA Act.

As has already been pointed out, resort to condemnation as the rule rather than the exception would be highly detrimental to TVA's permanent program as a regional agency. TVA has succeeded in making condemnation the rare exception. The owners of only about 3 per cent of the tracts acquired by TVA have refused to convey voluntarily and thus compelled TVA to resort to condemnation. The TVA policies of fair appraisals, no price-trading, and like treatment of landowners insofar as possible, have been largely responsible for this extraordinary record, but these factors alone would not have made it possible had the TVA Act provided that the issue of just compensation be tried by jury or that condemnation proceedings under the TVA Act be governed by the Conformity Act,²⁶ which would have meant that this issue would be tried by a jury in all states in which TVA carries on any operations, except Virginia.²⁷ Where the issue of just compensation is determined by a

mony except upon a showing of facts or circumstances sufficient to justify or excuse the failure to introduce such testimony before the Commissioners."

²⁵ "We have had so many bitter experiences of the Government being imposed upon in their attempt to acquire land that I asked the Department of Justice to send their expert down here for a conference. Assistant Attorney General Richardson had two conferences with me, and based on his experience, growing out of hundreds and hundreds of cases all over the Nation, this provision has been drawn by him. It is his language, adopted by us after we considered it. He told us this. For instance, they found it necessary to acquire a little lot of land somewhere on the New England coast. The preliminary Commissioners estimated it to be worth about \$1,100. They proceeded to condemn the land, it went finally to a jury, and the jury brought in a valuation verdict of \$44,000." *Muscle Shoals, Hearings before the House Committee on Military Affairs*, 73d Cong., 1st sess. 43 (1933).

²⁶ 17 STAT. 196, 197 (1872), 28 U.S.C. § 724 (1946).

²⁷ In most states the condemnation procedures are extremely cumbersome. In Tennessee, there is first a hearing before a "jury of inquest" at which the parties introduce evidence. If either party is dissatisfied with the award, he can file exceptions and have a trial de novo before a common law jury. Unlike the trial de novo under the TVA statute in which the court reviews the case on the record before the commission, the trial before the jury is a complete new trial. There are thus two complete trials of the issue of just compensation, and the first trial is usually a complete waste of time and money. According to a witness for the Department of Justice, testifying before the Senate Judi-

jury, the award in one case is no indication of what the award of a different jury will be in the next case, and no matter how fair a price the landowner has been offered there is always the possibility that a jury will award him a great deal more. A jury trial procedure is, therefore, an invitation to the landowner to litigate.

Under the commission procedure prescribed by the TVA Act, the opportunity to gamble on the award of a jury is eliminated. Although the commission hearings frequently result in awards higher than the amount offered by TVA for the property, the awards have a degree of uniformity and it rarely happens that an award is extremely high. The uniformity in commission awards is brought about by a number of factors. The members of the commission usually have a knowledge of land values far superior to that of the ordinary juror to begin with and they soon develop a high degree of competency, both in knowledge of land values and ability to weigh the testimony of the witnesses. They hear all of the cases within a district and thus are in a position to test the value of the land in condemnation by comparing it with other lands being acquired for the same project. When hearings are scheduled in a new district, it has frequently happened that the awards in the first two or three cases are excessive, but after the commission has acquired more experience, the awards are rarely very far out of line. The realization by the landowners that there is little probability that they will obtain through litigation a substantial increase over the amount offered has contributed greatly to TVA's success in acquiring the land needed for its projects by voluntary purchase and sale.

A second advantage of the TVA condemnation procedure is that it reduces the administrative costs to a minimum. Despite the extensive land acquisition program being carried on by TVA, only five attorneys on the TVA legal staff devote any substantial amount of time to condemnation matters and none of these devote themselves to condemnation exclusively. This results from several factors. In the first place, the number of condemnation cases is only a fraction of what it might be under a different land acquisition policy with a different condemnation statute. In the second place, appeals are infrequent. Of approximately 1,450 condemnation cases, which have been tried by commissions, less than 10 per cent

ciary Committee in 1942, there is a de novo trial in at least 90 percent of the cases tried under this type of procedure. *Hearing before Subcommittee of Senate Committee on the Judiciary* on S. 2625, S. 2626, H.R. 7413, 77th Cong., 2d sess. 15 (1942). Similar provisions are found in all Tennessee Valley states except Virginia. TENN. CODE ANN. §§ 3109-3170 (Williams 1934); ALA. CODE ANN. tit. 19, §§ 1-31 (1940); MISS. CODE ANN. §§ 2749-2782 (1942); GA. CODE ANN. tit. 36, §§ 101-1116 (1933), N.C. GEN. STAT. ANN. c. 40, §§ 1-53 (1943); KY. REV. STAT. §§ 416.010-416.990 (1948).

have been heard by or are now pending on appeal to the district courts. Only 14 cases have been appealed to the courts of appeals and in two of these the appeals were dismissed prior to a hearing. The small number of appeals is due in large measure to the reluctance of the courts to disturb the awards of the commission.²⁸ The courts have selected competent commissioners, who have viewed the land and heard the evidence, and unless the case presents some question of law as to the proper measure of compensation or the admissibility of evidence there is little likelihood that the award will be set aside.

A further advantage of the statutory procedure to a regional agency is that the cases are not on the regular dockets of the courts. This makes it possible to schedule commission hearings in such a way as to meet the convenience of counsel. TVA now has cases pending before 14 separate commissions in 15 divisions of eight judicial districts. Under the commission procedure, it is possible to schedule the hearings in such a way that they can be handled with TVA's small legal staff. This would not be possible if it were necessary to try the cases at the regular jury terms of court.

The procedure is also expeditious and does much to conserve the time of the courts. A commission can be appointed and the case heard as soon as all interested parties have been served with process. Since the cases are not on the regular docket, it is not necessary to await the regular terms of court as it would be under a jury trial procedure. They rarely require the intervention of the district judge prior to the close of the commission hearing and in 90 per cent of the cases, the commission hearing disposes of the cases finally.

EFFECT OF PROPOSED CONDEMNATION RULE

The proposed rule to govern condemnation cases submitted to the Supreme Court by the Supreme Court Advisory Committee on May 17, 1948, would require a number of changes in the detailed procedures followed by TVA, such as the form of complaint and the method of service of process, but it would bring about no change in the method of determining just compensation, the phase of the TVA procedure discussed herein. The TVA statutory procedure is preserved by subdivision (h) of the rule, which provides as follows:

Trial. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have

²⁸ See *Fain v. United States*, 145 F. 2d 956 (C.C.A. 6th 1944), *United States v. Brandon*, 153 F. 2d 781 (C.C.A. 6th 1946).

a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix. Trial of all issues shall otherwise be by the court [Advisory Committee on Rules for Civil Procedure, *Report of Proposed Rule to Govern Condemnation Cases in the District Courts of the United States* (May, 1948), pp. 6-7].²⁹

SUMMARY

The basic land acquisition problem faced by a regional agency is that of carrying on an extensive land acquisition program in such a way as to facilitate, rather than hinder, the accomplishment of its permanent program in cooperation with the people of the region. The TVA land acquisition program has accomplished this objective. While there have been isolated cases of dissatisfaction, the TVA land acquisition program has received widespread approval from the persons directly affected by it and has gone far to make possible the successful accomplishment of TVA's statutory objectives. It has also proved to be economical. Since only 3 per cent of the tracts have been acquired as a result of contested condemnation proceedings and the final prices paid for the tracts condemned have been in the neighborhood of only 15 per cent above the amount of TVA's appraisal, it follows that the total price paid for all tracts acquired has been only a fraction of a per cent above the total of the appraisals.

Policies of liberal but careful appraisals, like treatment of all, and no price-trading, implemented by a condemnation procedure such as that prescribed in the TVA Act, largely eliminate the incentive to the landowner to refuse to accept a fair price for his property and gamble on the hope that he may obtain in litigation a great deal more than his property is worth.

The experience of TVA with these policies establishes that a land acquisition program can be a source of positive benefit to a regional agency, instead of a source of conflict with the landowners.

²⁹ The reasons for exempting the TVA procedure from the general provision for trial by jury are set forth in the Report of Proposed Rule to Govern Condemnation Cases in the District Courts of the United States, prepared by the Advisory Committee on Rules for Civil Procedure (May, 1948).